

MAR 2003

In the Supreme Court

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Appeal from the Court of Appeals  
[Janet T. Neff, E. Thomas Fitzgerald, Michael J. Talbot]

ROBERT R. ANDERSON and CHRISTINE  
M. ANDERSON, as Next Friends of  
ROBERT C. ANDERSON, a Minor,

Plaintiffs - Appellees

v

SC: 121587  
COA: 227832  
Oakland CC: 99-016011-NO

PINE KNOB SKI RESORT, INC.,

Defendant - Appellant.

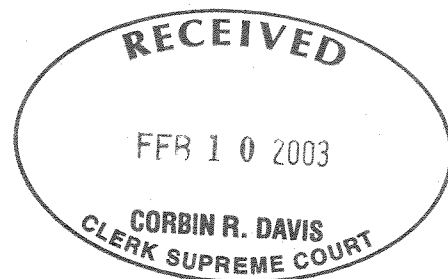
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Reply Brief on Appeal of Defendant - Appellant

Oral Argument Requested

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## **I. STATEMENT OF RELEVANT REPLY FACTS**

In his Brief, the Plaintiff/Appellee Robert C. Anderson ("Plaintiff") now attempts to create questions of fact where none exist. This tactic should be rejected by this Michigan Supreme Court. In Reply, the Defendant/Appellant Pine Knob Ski Resort, Inc. ("Defendant") briefly puts forth the relevant and uncontroverted facts established by the pleadings, record testimony and discovery admissions.

### **A. The Ski Course is Set by the Ski Coaches and Not the Defendant.**

On January 5, 1999, the Plaintiff was participating in a high school ski race sponsored by the South East Michigan Ski League ("SEMSL") when he caught his ski on snow, ice or a variation in terrain, lost control and veered into a race timing structure. The race course which the Plaintiff was skiing on was setup by the SEMSL coaches and inspected by the skiers – including the Plaintiff – before the race. Thomas Halsey was the varsity ski coach for Cranbrook High School and the SEMSL Vice President. He is not a party to this action. As an unbiased non-party witness, Mr. Halsey provided an affidavit indicating that the SEMSL ski league had a pre-existing schedule which designated which coach of which team would have the responsibility of setting up the ski race course on any given day.

- "4. That I am familiar with the preparation of the SEMSL, scheduling and the scheduling includes the designation of which coach will set the course for any given race." (Affidavit of Thomas Halsey -- **Appendix** at p. 48a)

John C. Lambert was also a ski coach for Cranbrook High School and he provided an affidavit confirming that on the day of the Plaintiff's injury, January 5, 1999, the actual ski race course was set by the coaches and not Defendant.

- "9. That the race course was set by the coaches on January 5, 1999, pursuant to a schedule agreed to by the coaches prior to the season." (Affidavit of John C. Lambert -- **Appendix** at p. 50a)

According to Halsey, on January 5, 1999, the ski coaches set the gates along the ski course and positioned the finish line poles.

- "5. That setting the race course involves setting the gates along the course and positioning the finish line poles.
6. That for ski races at Pine Knob, the ski coaches set the race course and position the finish line poles." (Affidavit of Thomas Halsey -- **Appendix** at p. 48a)

According to Lambert, after the course is set up the ski racers have the opportunity to inspect the course prior to the race.<sup>1</sup>

- "10. That for purposes of the high school ski league, the racing course at Pine Knob is set up by the coaches pursuant to a schedule set before the season. Once the course is set, the ski racers have the opportunity and right to inspect the course prior to the start of the race" . (Affidavit of John C. Lambert - **Appendix** at p. 50a)

In fact, the ski coaches for SEMSL set the ski race course on the day of any race based on snow depth, equipment location and the skier's safety.

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<sup>1</sup> Plaintiff testified that he had a practice run and did inspect the course.

- "Q Practice runs on the course?
- A No, on the -- just the hill next to the course. I also inspected the courses we were about to race." (Plaintiff's Deposition -- **Appendix** at p. 36a)

"A: I'm sure I consider snow depth, whether I can set the course where I want to set it or maybe make a little dog leg somewhere on the hill to keep the right amount of snow depth, and probably most important is the safety factor, I mean I have to make sure I'm not near a snow gun, a fence or tree or anything like that." (Rosengren dep. – Appendix at p. 54a)

As a result, the Defendant had no role in setting up the ski race course or the finish line poles on the day of the Plaintiff's injury. The Plaintiff's unsupported assertions in this regard are not true.

**B. The Timing Structure Was Constructed By SEMSL Not the Defendant.**

Beyond indicating that the ski race course on the day of the Plaintiff's accident was set up by the ski coaches, Halsey also stated that the race timing structure, which housed the weather sensitive timing devices, which the Plaintiff collided with was actually constructed by volunteers including him. It was not constructed or placed by the Defendant. In fact, the volunteers actually built the timing shed out of donated wood.

"11 That the timing shack was built by volunteers – including myself – out of donated wood to be used during ski races."  
(Affidavit of Halsey -- **Appendix** at p. 48a)

The timing shed was actually padded with bright orange and blue pads which stood out against the background of the white snow making the timing shed and its padding highly visible.

"A That's probably one reason why there are pads in front.  
That's also for visibility.

Q Visibility? These orange and blue pads, you think they provide visibility at 4:00 o'clock in the afternoon to a racer coming down a slalom course?

- A Yes. You see the bright colors on the snow over other stuff, yes." (Deposition Joseph Kosik -- **Appendix** at p. 46a)

These facts are clear and confirmed. The ski race course which the Plaintiff was racing down prior to his catching an edge and veering into the timing shed was set up by the ski coaches and not by the Defendant. The Defendant had no role in setting the gates or the location of the finish line for the course. This was all done by the SEMSL ski coaches.

## **II. LEGAL ARGUMENT**

The Plaintiff's claim is barred by MCL 408.342(2) because the Plaintiff assumed the risk of injury resulting from variations in terrain and snow and ice conditions. The Plaintiff's argument on the snow and ice component of this case conflicts with his Complaint, his testimony, the testimony of every eye witness and the testimony of his own father.

### **MCL 408.342(2) Bars the Plaintiff's Claim.**

MCL 408.342(2) unequivocally provides that a skier assumes the danger of injuries which can result from variations in terrain, snow and ice conditions:

- "(1) While in a ski area, each skier shall do all of the following:
  - (a) Maintain reasonable control of his or her **speed** and **course** at all times...
  - (c) Heed all posted signs and warnings...
- (2) Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. **Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with ski lift towers and**

their components, with other skiers, or with properly marked or plainly visible snow making or snow grooming equipment."(MCL 408.342.) (Emphasis Added.) (**Appendix at p. 7a**)

**First**, Thomas Halsey was the coach for Cranbrook's ski team, the Vice President of SEMSL and an eyewitness to the Plaintiff's accident. In a sworn Affidavit, Thomas Halsey states that the Plaintiff was "skating" to the finish line which has the effect of achieving more speed and is a frowned upon practice in ski racing. Halsey further states that the Plaintiff lost his balance when he decided to "skate" and **one of his skis caught an edge on the snow** resulting in his change of his course.

- "7. That I was personally present at Pine Knob on January 5, 1999, and I was at the ski race hill.
8. That I personally watched Robert C. Anderson participate in the ski race and I personally saw Robert C. Anderson collide with the timing shack.
9. That I saw Robert C. Anderson attempt to "skate" as he was heading for the finish poles. Skating is an inappropriate technique and causes a shift of balance on the skis. This imbalance caused an unintended contact with the snow, resulting in Robert C. Anderson's severe change in course to the right which caused his collision." (Affidavit of Halsey -- **Appendix at p. 48a**)

**Second**, the Plaintiff himself admits that he caught an edge with his ski which caused him to veer to the right. Within Plaintiff's Brief filed with this Michigan Supreme Court he states:<sup>2</sup>

"At the end of Anderson's first run that day, he placed second among all skiers. As Bobby completed his second run, however, he "caught an edge" of his ski, causing him to veer to the right." (Plaintiff's Brief to the Michigan Supreme Court at p. 2.)

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<sup>2</sup> Plaintiff's own complaint pleads that he lost control near the end of the course, fell and collided with the timing shack. (Complaint -- **Appendix at p. 24-25a**)



**Third**, the Plaintiff admits in his responses to Defendant's Requests for Admission that he caught an edge at the finish area of the hill and suffered injury as a result.

"53. Please admit that Plaintiff, Robert C. Anderson, moments prior to his alleged injury on January 5, 1999, lost his balance.

**RESPONSE:** Plaintiffs admit that Robert C. Anderson lost his balance at the last gate and caught edge while passing through the finish area at the bottom of the race hill provided by Pine Knob Ski Resort for the high school ski race and his momentum carried him into the unpadded and inadequately protected shack located approximately 15 feet from the finish line. (Plaintiffs' Responses to Defendant's Requests for Admissions No. 53.) (**Appendix** at p. 78)

**Finally**, Plaintiff's own father confirmed that the Plaintiff's injury resulted from his catching of an edge which veered him off into the timing structure.

"I believe the way he explained it to me is he – on the final turn – at some point on the course he caught an edge, which veered him off into the shack." (Plaintiff Robert R. Anderson's Dep at p. 38) (**Appendix at p. 60a** )

Despite all of this uncontroverted testimony the Plaintiff now argues that MCL 408.342(2) does not bar his claim because his catching of an edge resulted from a momentary loss in balance.

"Anderson indeed testified that the reason he caught an edge was a loss of balance." (Plaintiff's Supreme Court Brief at p. 8.)

The fact is the Plaintiff did catch an edge on snow, ice or terrain all of which are enumerated dangers under MCL 408.342(2). There is no magical material which suddenly

appeared on the course that was not snow, ice, or terrain. In fact, the Plaintiff has never argued that his ski did not catch an edge on one of these enumerated dangers. Instead, Plaintiff now argues to this Michigan Supreme Court that he lost his balance which caused him to catch an edge which then resulted in him losing control and colliding with the timing shed. However, there is nothing in MCL 408.342(2) which states that a skier assumes the risk of injury from variations in terrain, surface or subsurface snow or ice conditions, bare spots, rocks, trees, and other forms of natural growth or debris unless a skier loses their balance. To read into MCL 408.342(2), the additional language that a skier assumes these dangers unless he loses his balance violates the rules of statutory construction which were recently laid down definitively by this Michigan Supreme Court in **Pohutski v City of Allen Park**, 465 Mich 675 ; 641 NW2d 219 (2002). On April 2, 2002, the Michigan Supreme Court rendered its Opinion in **Pohutski** which provides a controlling analysis of the rules of statutory construction.

**"When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute."  
(Pohutski, 641 NW2d at p. 226.) (Emphasis Added)**

In **Pohutski**, this Michigan Supreme Court ruled that when interpreting a statute, every word is used for a purpose and a Michigan court cannot assume that the Michigan Legislature inadvertently made use of one word or phrase instead of another.

"When parsing a statute, we presume every word is used for a purpose. As far as possible, we give effect to every clause and sentence. 'The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another.' **Robinson v Detroit**, 462 Mich 439, 459; 613 NW2d 307 (2000)" (**Pohutski**, 641 NW2d at p. 226)

“Similarly, we should take care to avoid a construction that renders any part of the statute surplusage or nugatory.” (Pohutski, 641 NW2d at p. 226.)

Based on the above, this Michigan Supreme Court, in applying MCL 408.342(2) to the uncontroverted facts presented, **must** presume that every word contained within the Ski Safety Act is used for a purpose. This Michigan Supreme Court cannot insert additional language into MCL 408.342(2) stating that a skier assumes the risk of dangers resulting from snow, ice or terrain **unless the skier loses their balance**. As a result, the Plaintiff’s claim is barred by MCL 408.342(2).

### III. **CONCLUSIONS AND RELIEF REQUESTED**

This case involves a racing skier and an admitted mishap with terrain, snow and ice. As matter of law, the analysis ends there. MCL 408.342(2) bars recovery because it operates as a complete assumption of the risk.

WHEREFORE, the Defendant respectfully requests that this Honorable Michigan Supreme Court:

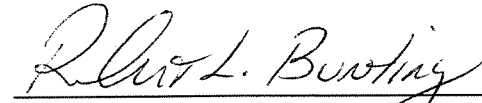
- I. Enter an Order reversing the Court of Appeals Opinion affirming the Trial Court’s Denial of Defendant’s Motion for Summary Disposition Dismissing the Case; or
- II. Enter an Order granting the Defendant’s Motion for Summary Disposition; and

- III. Enter an Order granting such other relief as this Court deems just, equitable and appropriate.

Respectfully submitted,


Dated: February 10, 2003

By:

  
ROBERT L. BUNTING (P24212)  
Attorney for Defendant/Appellant

Dated: February 10, 2003

By:

  
ROBERT CHARLES DAVIS (P40155)  
Of Counsel and Co-Counsel to  
Robert L. Bunting

**PROOF OF SERVICE**

I served Defendant/Appellant, Pine Knob Ski Resort, Inc.'s  
**Reply Brief on Appeal** upon the attorneys of record and/or  
parties in this case on **February 10, 2003** by:

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Elaine Michling